

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1213

To argued by
PHYLIS SKLOOT BAMBERGER

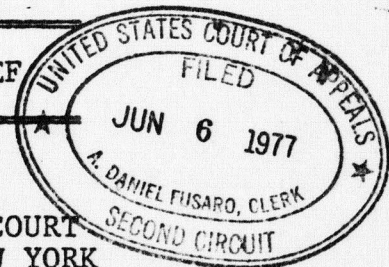
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
LUIS CASHMERE,
Defendant-Appellant.
-----x

B
pg 5
Docket No. 77-1213

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

OFFENSE PO ☐	JUDGE/ASSIGNMENT	U.S.	Case Filed Mo. Day	76	0472	01
OFFENSE MO ☐	0208 01	vs.	05:12			
MEANOR Mis ☐	Dist./Sentence	CASHMERE, LOUIS	No. of Defs			
FELONY Fel ☒	01	t/n Luis Cashmere	* 01			
		(LAST, FIRST, MIDDLE)	JUVENILE			

U.S. TITLE/SECTION
21:812, 841OFFENSES CHARGED
Distr. & possess. of Cocaine II.ORIGINAL COUNTS
1

U.S. MAG. CASE NO. 76-158

BAIL - RELEASE

☐ Denied	AMT	☐ Fugitive
☐ Set		☐ Pers. Recog.
		☐ PSA
\$ 000		conditions
Date		☐ 10% Deposit
		☐ Surety Bond
☐ Bail Not Made		☐ Collateral
☐ Status Changed (See Docket)		☐ 3rd Ptry Cust
		☐ Other

II. KEY DATES & INTERVALS

ARREST or U.S. Custody Began 2-5-76	INDICTMENT Information 5-12-76	ARRAIGNMENT 1st Plea 5-20-76	TRIAL Trial Set For Voor Dire	SENTENCE Disposition of Charges 12-13-76
Summons Served	Indict. Waived	Superseding ☐ Indict/Info	☐ NG ☐ G ☐ NOL	☐ Convicted
First Appearance	In Charging District	Final Plea	☐ NG ☐ G ☐ NOL	☐ Acquired
				☐ Dismissed
				☐ On All Charges
				☐ On Lesser Offense(s)
				☐ WOP: ☐ WP
				☐ On Government's Motion

Search Warrant	Issued	DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME:
Summons	Return			2/5/76	S.S.-080E	☐ DISMISSED
Arrest Warrant Issued	Issued			2/11/76		☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
COMPLAINT	Served	2/5/76	S.S.-080E			☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW:
OFFENSE (In Complaint)						

U.S. Attorney or Asst.

Robert J. Jossen
791-1928

ATTORNEYS

Defense: ☐ CJA ☐ Ret: ☐ Waived ☐ Self ☐ None / Other: ☐ PD: ☐ CD

Franklin Gould - 401 Bldg - 500

T. GORMAN REILLY, AUSA 249

-1174

* Show last names and suffix numbers of other defendants on same indictment/information:

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY
2/5/76		Complaint filed, Legal Aid assigned. Defendant remanded into the custody of U.S. Marshal in lieu of \$3,500 cash or surety.	(a) (b) (c) (d)
2/10/76		Bail increased to \$5,000 cash or surety by Magistrate Leonard Bernikow. Defendant released on bail, address: 203 W. 85th St., N.Y., depositor: Vivian Criscitiello, address: 5716 - 12th Ave., Bklyn, N.Y.	
5/12/76		Indictment filed, 76 Cr. 472	
5-20-76		Deft. present (w/o Atty.) Court directs a not guilty plea to be entered. Case assigned to Judge Knapp for all purposes. Atty. to report to chambers as soon as possible. Bail continued as fixed in the amount of \$3,500. Filed Atty. affirmation requesting adjournment to a later date.	
06-09-76		Filed Govt's notice of readiness for trial.	
09-15-76		Deft. (atty. Franklin Gould) present. Hearing held on motion to suppress. Decision reserved. Knapp, J.	
09-22-76		Filed def't's notice of motion re: suppression, etc.	
09-22-76		Filed memo-end. on motion docketed this date, ... motion denied. Knapp, J. m/n	
09-30-76		Pre-trial conf. held. Trial Date 10-18-76 at 10:30AM. -2 9-30 E 1	

DATE	76CR.472	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY			
	(DOCUMENT NO.)			Interval Section II (a)	Start Date End Date (b)	LT Code (c)	Total Days (d)
10-26-76		Deft. (atty. Franklyn Gould) jury trial begun before Judge Palmieri.					
10-27-76		Trial cont'd. and concluded. Deft. found "Guilty" as charged. Pre-sentence investigation ordered. Date of sentence 12-8-76 at 4PM. Deft. remanded pending sentence. Palmieri, J.					
11-11-76		FILED TRANSCRIPT dated 9-15-76....					
12-13-76		Filed Judgment(Franklyn Goula)present)the deft is committed for a period of EIGHT YEARS....Pursuant to the provisions of Section 841 of Ti.21, U.S.Code, the deft is placed on SPECIAL PAROLE for a term of FIVE YEARS, to commence upon expiration of confinement. PALMIERI, J...Ent.12-15-76----- Issued commitment and copies.....					
12-22-76		Filed commitment and entered return.Deft delivered to M.C.C. on 12-13-76.					
2-4-77		Filed memo endorsed on letter dtd. 1-15-77 The court construes petitioner's letters of 1-10-77 and 1-15-77 as a motion for reduction of sentence***The motion is denied. Campbell , J.... (Copy sent to deft.)					
3-9-77		Filed application for leave to proceed in forma pauperis ...and appointment of counsel..					
4-4-77		Filed transcript of record of proceedings dated: Oct.26,27, Dec. 13, 1976.					
4-5-77		Filed <u>Opinion No.45759</u> that since no time notice of appeal was filed on deft's behalf,his right to appeal has been terminated by lapse of time.Accordingly,Court lacks jurisdiction to grant relief sought .The deft's application is, therefore,denied.PALMIERI,J m-n notified US Atty.					
4-15-77		Filed opinion #45794 This opinion is intended to supplement this Court's decision dated 4-5-77 deying petitioner's motion for leave to proceed in forma pauperis***the court grants petitioner's motion and DIRECTS the Clerk of Court to prepare and file forthwith a notice of appeal on behalf of the petitioner***Palmieri, J. (Copy mailed to petitioner P.O.Box 1000 Lewisburg, Pa.17837, to AUSA and Appeals Clerk)					
Apr 15-77		Filed defendant's notice of appeal (effective nunc-pro-tunc as of 12-13-76- Palmieri, J.) from judgment of conviction of 12-13-76. Mailed copies to U.S. Atty. & deft. at P.O. Box 1000, Lewisburg, Pa. 17837.					
4-18-77		Filed Magistrate's papers including appearance bond, financial affidavit & complaint.					

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	RECEIPT NUMBER	C.D. NUMBER

TRUE COPY
RAYMOND E. BURCHARDT, Clerk

By

Deputy Clerk

JUDGE PALMER

76 CRIM. 0472

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA :

-v- :

LUIS CASHMERE, a/k/a
"Angel Luis Filomeno," :

Defendant. :
-----x

INDICTMENT

76 Cr.



The Grand Jury charges:

On or about the 5th day of February, 1976

in the Southern District of New York, LUIS CASHMERE,
a/k/a "Angel Luis Filomeno," the defendant, unlawfully,
intentionally and knowingly did possess with intent
to distribute, a Schedule II narcotic drug controlled
substance, to wit, approximately 267.8 grams of cocaine
hydrochloride.

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(A).)

Catherine Guegan
Foreman

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.,
United States Attorney

MICROFILM
MAY 12 1976

①

A TRUE COPY
RAYMOND F. BURGHARDT, CLERK
By [Signature]
Deputy Clerk

76 CRIM. 047 JUDGE ~~KNAPP~~ 76

Form No. USA-33a-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

LUIS CASHMERE, a/k/a
"Angel Luis Filomeno,"

Defendant.

INDICTMENT

76 Cr.

(21 U.S.C. §§ 812, 841(a)(1)
and 841(b)(1)(A).)

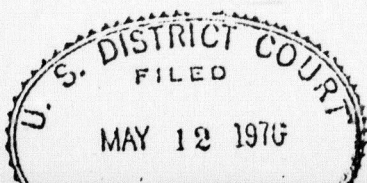
ROBERT B. FISKE, JR.,

United States Attorney.

A TRUE BILL

Catherine Crecan
Foreman.

FPI-SS-2-19-71-20M-6950



MAY 20 1976

Left present (w/o atty) Court
directs a 71.9 plea be entered. Case
assigned to Judge Knapp for all purposes.
Report to Judge Knapp's chambers as
soon as possible. Bail set'd
as given \$3,500.

Mac Mador. J.

SEP 15 1976

Def. present (Franklin Hould, Esq.). Hearing
held on motion to suppress. Decision reserved.
Knapp

SEP 30 1976

Pre-trial conference held. Trial date 10/8/76
at 10:30 A.M.

OCT 26 1976

Def and atty Franklin Hould present.
Jury trial began before Judge Calinieri.
Trial continues.

OCT 27 1976

OCT 27 1976

Issue Contention and Conclusion

Jury Verdict - Left "Booby" as charged.

Q Pres. Sentence Due Order, Date of Sentence
Dec 8, 1976 at 4:00 PM. Left Remanded
Pending sentence.

12-8-76 Left and (atty Franklyn Gault, Palmeri, J.)
Sentence Imposed -

Reilly - 114511

DEC 13, 1976 - Deft (Franklyn Gault, of Course) sentenced
to 8 years to be followed by 5 yrs
Special parole (Title 18, U.S.C. Sec. 841)

Palmeri, J.

(RW) closed

CHARGE OF THE COURT

(Palmieri, J.)

THE COURT: Ladies and gentlemen of the jury:
First of all, let me thank you for the close attention which you have paid throughout the trial and I am sure that you will give the same devoted consideration to the evidence and to the arguments of counsel which you have given to the reception of the evidence. I may refer to some of the evidence during the course of my charge but please do not feel that I am attempting in any way to impinge upon your exclusive fact finding functions or that I am intending to denigrate any portion of the evidence.

All of the evidence is before you. Everything that has been admitted into evidence, the exhibits, the testimony of the witnesses, the stipulations of counsel are before you and you should consider all of them.

I have already warned you about any questions that I may have asked. I want to stress at this time that you should not be in any way affected either by my rulings of law or by questions I may have asked. My questions deserve no more, and no less consideration than questions put by counsel and I have had only one purpose in asking any questions and that was to clarify matters that I thought would be of special interest and importance

2 to you in understanding the facts.

3 Above all, remember that it is your recollection
4 that is controlling to the exclusion of mine, to the
5 exclusion of the attorneys' recollection.

6 If you get to the point where you have to refer
7 to the court record, the stenotypist's notes which have
8 been taken throughout this proceeding will be available
9 to you and you can have any portion of the record read
10 back to you if you get to the point that you want to hear
11 it.

12 If you want to look at any exhibits, they
13 will be made available to you and you need only ask for
14 them and this indictment which I will read to you in
15 a moment can also be made available to you if you wish
16 to look at it.

17 Remember, you should decide the case only on the
18 evidence you heard during the course of the trial subject
19 to the law as I am about to charge you and without fear,
20 favor or prejudice of any kind at all.

21 The burden of proof rests upon the government
22 and never shifts to the defendant.

23 This is a criminal case and the government
24 has the burden of proving the defendant guilty beyond
25 a reasonable doubt and the defendant is presumed to be

2 innocent throughout the trial and throughout your de-
3 liberations until such time, if that time ever comes,
4 when the presumption of innocence is overcome by proof
5 of his guilt beyond a reasonable doubt.

6 You may not find the defendant guilty if you
7 have a reasonable doubt about any of the facts necessary
8 to constitute the crime and reasonable doubt may be based
9 upon the evidence or the lack of evidence in the case.

10 What is a reasonable doubt? A reasonable doubt
11 is such a doubt as would cause a reasonable person to
12 hesitate to act in the more serious and important affairs
13 of life. It is a doubt which a reasonable person has after
14 carefully weighing all the evidence. Reasonable doubt
15 is one which appeals to your reason, your common sense
16 and your experience. Beyond a reasonable doubt does not
17 mean to a mathematical certainty or beyond all possible
18 doubt. A reasonable doubt is not caprice, whim or specula-
19 tion. It is not an excuse to avoid the performance of
20 an unpleasant duty. It is not sympathy for a defendant.
21 Vague, speculative or imaginary qualms or misgivings are
22 not reasonable doubts. If, after a fair, impartial
23 and careful consideration of all the evidence you are
24 convinced of the guilt of the defendant, you must convict
25 him.

If, on the other hand, after such a fair, impartial and careful consideration of all the evidence you doubt that the defendant is guilty, you must acquit him.

What have we here? We have an indictment which contains one count. I have already told you that this indictment is not evidence. It is a procedural device or a formal notice whereby the defendant is advised of the nature of the accusation made against him and it is within that context that the case is tried, but the fact that an accusation is made constitutes no proof whatever that the accused person actually did any of the acts contained in the accusation. I say this as a word of warning.

This indictment is very brief. It contains only one count which alleges the following: On or about the 5th day of February, 1976, in the Southern District of New York Luis Cashmere, also known as Angel Luis Filomene, the defendant, unlawfully, intentionally, knowingly did possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 267.8 grams of cocaine hydrochloride.

In essence, the government charges that Luis Cashmere violated the law and that he unlawfully possessed with intent to distribute cocaine which is a narcotic controlled substance under the law.

1 I shall now explain the law which is the basis
2 of the charge in the indictment.

3 The charge in the indictment relates to the
4 violation of Sections 812 and 841 of Title 21 of the United
5 States Code.

6 In pertinent part, Section 841 provides the
7 following, and I quote:

8 "It shall be unlawful for any person knowingly
9 or intentionally to distribute or possess with intent
10 to distribute a controlled substance."

11 Section 812 sets forth "controlled substance"
12 in various schedules. Schedule II of Section 812 lists
13 cocaine hydrochloride as a controlled substance. Cocaine
14 in all its forms is thus a controlled substance.

15 Before you can find the defendant guilty of
16 the crime charged in this indictment, you must be
17 convinced beyond a reasonable doubt that the government
18 has proved the following elements and if you do entertain
19 a reasonable doubt with respect to any one of these following
20 elements, then it will be your duty to acquit the defendant.

21 The essential elements to which I refer are the
22 following: First, that on or about February 5, 1976,
23 the defendant possessed with intent to distribute a
24 narcotic controlled substance.
25

1
2 Second, that he did so unlawfully, intentionally
3 and knowingly.

4 And third, that the substance in Government's
5 Exhibit 1, which is in evidence, is in fact a narcotic
6 controlled substance.

7 I would like to say a few further words on these
8 elements. You will note that the first element of the
9 offense is possession with intent to distribute the
10 drug. What does that phrase mean? To start off, the
11 word "deliberate" means the actual, constructive or
12 attempted transfer of the drug and the word "possess"
13 has its common, everyday meaning, that is to have something
14 within your control. And finally, the word "intent"
15 refers to a person's state of mind. So the term "possess
16 with intent to distribute" can be fairly stated to mean:
17 to control an item with the state of mind or purpose
18 to transfer that item.

19 On this element, the government contends that
20 it has proved beyond a reasonable doubt that Luis Cashmere
21 knowingly possessed the drug, and that at the time he
22 possessed it his mental state was such that he would
23 transfer it to someone else.

24 As to the second element, the terms "unlawfully,
25 intentionally and knowingly" mean that you must be satisfied

1 beyond a reasonable doubt that Luis Cashmere knew what
2 he was doing and that he did it deliberately and voluntarily
3 as opposed to mistakenly or accidentally or as a result
4 of some coercion. Of course, it is not necessary that
5 the defendant knew he was violating any particular law.
6 Rather, it is sufficient if you are convinced beyond
7 a reasonable doubt that he was aware of the general unlawful
8 nature of his acts and that he knew he was in possession
9 of cocaine and was dealing in it.
10

11 As to the third element, the indictment charges
12 that the narcotic drug controlled substance is cocaine.
13 I instruct you as a matter of law that cocaine is a
14 narcotic drug controlled substance. There was a stipulation
15 by the attorneys to the effect that if the government
16 chemist were called as a witness, he would testify in a
17 certain sense. That was not a stipulation that this substance
18 is cocaine but it is a stipulation that the government
19 chemist would have so testified.

20 I respectfully suggest, ladies and gentlemen,
21 that you should have no difficulty in coming to the
22 conclusion that the Government's Exhibit 1 does indeed
23 contain a quantity of cocaine as the government contends,
24 but here again I insist upon emphasizing that this is an
25 element of fact about which you must be persuaded beyond

1 a reasonable doubt and you must find it as an essential
2 element of the case and it is up to you to find it and no
3 one else.
4

5 Knowledge and intent exist in the mind and
6 since it is not possible to look into a man's mind to see
7 what went on, you see what went on by arriving at a decision
8 with respect to the surrounding circumstances and the
9 nature of his conduct. You should take into consideration
10 all the facts and circumstances shown by the evidence,
11 including the exhibits, and determine from all such facts
12 and circumstances whether the requisite knowledge and
13 intent were present at the time in question. Direct proof
14 is unnecessary. Knowledge and intent may be inferred
15 from all the surrounding circumstances.

16 Let me define circumstantial evidence for you
17 because it can have a bearing upon your determination.
18 Evidence presented to you is circumstantial whenever you
19 are supplied with facts from which you are asked to deduce
20 that other facts also exist.

21 You are permitted to resolve disputed questions
22 of fact on the basis of direct evidence, circumstantial
23 evidence or both.

24 The testimony of an eyewitness based upon knowledge
25 acquired as a result of actual and personal observation is

1 direct evidence of what the witness observed. Evidence
2 of facts which allow you, based upon your common ex-
3 perience, to deduce or conclude that other facts or
4 events occurred is termed circumstantial evidence.
5

6 Circumstantial evidence is proper and competent
7 proof. Circumstantial evidence appeals to the common sense
8 and common experience of mankind and these teach us that
9 the existence of some facts necessarily implies that
10 other facts connected with them exist. Sometimes circum-
11 stantial evidence is even more convincing than direct
12 evidence because direct evidence may depend upon the memory
13 or observation and truth of one witness, while circumstantial
14 evidence may be based upon the memory, observation and
15 truth of many witnesses who concur and agree, or upon
16 physical facts which cannot be mistaken and cannot
17 speak falsely.

18 We very often use criteria of circumstantial
19 evidence in our daily lives. A mother who comes upon a
20 small child standing on a chair trying to reach for a high
21 cookie jar and seeing the jar open with crumbs of the
22 cookies on the floor and looking at the child and trying
23 to say, you have taken some cookies, haven't you. The
24 child doesn't answer but the mother inspects the cookie jar.
25 She knows how many cookies are there and she comes to

a conclusion that that's pretty good circumstantial evidence that the child has had his hand in the jar.

I remember once sitting on the porch with a friend at a farm house in Maryland on a beautiful day in the fall. We were looking over the hills and he suddenly handed me a pair of binoculars and said, "My God, they have tasted blood. I will have to kill them." I didn't know what he was talking about. I looked in the direction in which he was looking and I saw two boxer dogs, of which he was very fond, approaching us and both of them unmistakably had red blotches on their noses which looked like blood and I could see a little beyond there was a flock of sheep that he owned and one of the sheep was lying prone on the ground. that's prerty good evidence that those dogs had killed one of the sheep. Only a palpable examination of the animal would have established it beyond any doubt but it was fairly good circumstantial evidence that that is what happened.

Just another word about wilfully and knowingly an act is doing wilfully and knowingly if it is done voluntarily and purposesly and not because of mistake, accident, mere negligence or other innocent reason.

An act is done wilfully if it is done knwoingly and deliberately. Wilful does not mean the defendant,

in addition to knowing what he is doing, must also know that he is breaking any particulaw law.

You have heard a number of witnesses in this case for the government, You have heard from drug enforcement Agent John Lawler, Agent Richard Bell and Agent Stephen Moran. Mr. Bell was recalled in rebuttal with respect to the picture of the defendant taken during his arrest processing and then for the defense you heard from Antonia Robles Perez who testified this morning through a Spanish interpreter.

There are certain facts in the case that are not disputed. There are other facts that are very, very seriously disputed and I suggest to you that one of the devices that you can use to establish the truth is to start with the facts that are not disputed and work from them to the more controversial aspects of the case.

For instance, there seems to be no question that the defendant Cashmere and Antonia Perez were up in the small hours of the morning at two places where they were drinking and they had apparently spent a considerable period of time together in this social club before the defendant approached this car. This car was observed by the agents for a period of some four hours, from about 9 in the morning until 1 o'clock when the arrest took place.

1 The car never moved and the agents had almost continuous
2 observation of it except for very brief periods of in-
3 terruption and it was always in the same place. The de-
4 fendant approached the car and got into it and then these
5 circumstances occurred according to the agent. He refused
6 to get out of the car, refused to acknowledge the attempt
7 of Agent Lawler to tell him that he was a narcotic agent
8 and that he was under arrest or that he wanted to speak
9 to him. I don't think he put him under arrest until he
10 saw the substance, but at any rate he wanted to speak to
11 him and wanted the car motor shut off and then there was
12 this highly controversial testimony which the defendant
13 through cross-examination and by argument to you has
14 objected to and controverts in which he suggests that this
15 bag, which the agents say he nudged out of the car and
16 tried to kick back towards under the car while not actually
17 succeeding, had some other origin.

18
19 The charge has been made in this case, and I
20 think rather directly by the defense, that these agents
21 framed the defendant, that they contrived to place
22 this defendant in a situation where the circumstances were
23 such that they could make it look like he was violating
24 the law, although in fact he was innocent, and this brown
25 bag was planted on him. Of course, if that happened, then

1
2 you have heard perjured testimony and you have been imposed
3 upon by the commission of a crime even worse than that for
4 which the defendant is charged and I join with you in the
5 request made by the United States Attorney, if you are
6 convinced for even a second that these agents are framing
7 this defendant, you should acquit him immediately.

8 With respect to each and every witness who has
9 testified in the course of this trial, you should consider
10 the inherent probability of what the witness said, the
11 demeanor of the witness while on the witness stand, the
12 force and effect of any contradictory statements if you
13 think they were made, the interest of the witness in testify-
14 ing in the manner that he did, and above all the quality
15 rather than the quantity of testimony, and if you believe
16 that any particular witness was guilty of a wilful falsehood,
17 you can do one of two things. You can accept the part that
18 you believe is credible and reject the part which you think
19 is tainted by falsehood, or you can reject all of it
20 on the ground that all of it is so tainted by falsehood that
21 none of it is worthy of belief. That is like a person
22 eating a fruit which appears to be sound when he suddenly
23 comes upon a hidden imperfection. Some persons will cut
24 out the imperfection and eat the rest of the fruit and
25 others will reject the whole fruit depending upon whether

1 the whole fruit is sufficiently tainted by the imperfection
2 to make none of the fruit wholesome. And that is pretty
3 much what the law says you should do in the testimony
4 of a lying witness. You don't have to believe everything
5 that a witness says. It is not an all or nothing proposition.
6 You don't have to hold it against the witness because
7 a witness contradicts himself. You ladies and gentlemen
8 from your mature experience know that honest persons
9 can sometimes be honestly mistaken. Honest persons can
10 sometimes make contradictory statements. Liars and
11 villains can sometimes lie with the greatest logical per-
12 suasion. There are no flat, rigid rules about these
13 infinitely subtle aspects of human conduct and again I
14 want to stress what I said to you at the outset of the
15 case, that you bring to bear upon your judgment of the
16 proof and your judgment of the witnesses this very
17 precious gift, your common sense, your good judgment in
18 determining whether you heard the truth and what the
19 significance of that truth is.

20
21 In determining whom you will believe and what
22 weight you will give to the testimony of the witnesses,
23 consider the nature of the evidence given by them, their
24 bias or prejudice, if any has been disclosed; their
25 opportunity to know and to remember the facts about which

1 they testify; their manner and deportment while on the
2 stand; their candor or frankness or lack of it; their
3 interest, if any, in the result of the trial and the extent
4 to which they are corroborated or contradicted by other
5 proof; the probabilities, as indicated by your common
6 sense and sound judgment, that the things asserted in their
7 testimony actually existed or occurred; and such other facts
8 appearing in the evidence as will, in your opinion, aid
9 you in determining the extent to which testimony is
10 worthy of belief.
11

12 You should ask yourself, as to each witness,
13 what the interest or motive that witness may have had
14 to testify in a particular manner. If you determine
15 that any witness has a motive or interest which might
16 lead him to testify falsely, has he done so or has he told
17 the truth notwithstanding any motive or interest he may have.
18 Even if you do not doubt the good faith of a witness,
19 you should look out for circumstances which might lead
20 to inaccurate testimony such as faulty memory or inadequate
21 perception and throughout this process you will be
22 using your common sense and understanding to assign to
23 the testimony of each witness the value and weight which
24 best appeals to your sound judgment.

25 I am sorry to hesitate, ladies and gentlemen.

1 lzh

2 I wasn't as quite well organized as I would have liked
3 to be. Maybe I shouldn't have asked you about the recess.
4 I should have told you I needed one but I didn't dare do
5 that.

6 Let's look at another aspect of this case that
7 has been talked about a good deal and a lot of the
8 testimony has had to do with it and that has to do with the
9 alleged assault on the defendant by one of the agents
10 or by two of them.

11 You will recall that the circumstances of this
12 man's arrest have been greatly emphasized by the defense
13 and they have, through cross-examination and through
14 argument, made a good deal of the fact that the defendant
15 was assaulted.

16 This evidence was admitted because of its
17 possible help to you in passing upon the credibility
18 of the agents who were present at the time of the arrest,
19 especially Agents Lawler and Moran. Now, the evidence
20 indicates, and you will be justified in concluding, that
21 the defendant resisted arrest, refused to cooperate
22 in leaving the scene of his arrest with the agents and
23 was causing a crowd to gather by making some sort of
24 exhortation in Spanish. The agents had a good deal of
25 trouble putting handcuffs on him, in-fact the defendant

2 eventually had to be carried or dragged into Lawler's
3 car and even there the altercation continued. You will
4 recall from the testimony even after he was put in the
5 car and he was by that point handcuffed, he was continuing
6 the fracas and tried to press the electric switch to open
7 the window and tried to get rid of a brown bag which
8 strangely enough had Lawler's lunch in it.

9 At that point Agent Moran testified that he
10 got out of his car in which he was following and sat in
11 the back seat with Lawler and the defendant.

12 It is pretty clear from the evidence that
13 when this fracas was over the defendant had a swollen
14 lip and torn clothing. Agent Moran was pretty close
15 to saying that he struck him or caused him to strike
16 the hood of the car in the course of the arrest. But
17 remember, that while you are free to accept or reject
18 the testimony of any agent in whole or in part, you are
19 not trying an assault case. There is another forum, maybe
20 another place and time when this complaint can be
21 properly ventilated. It is not in this court. You are
22 not here to hold the agents guilty or innocent of any assault
23 and even if you are convinced that the defendant was
24 struck and that his being struck was not part of a general
25 melee in connection with an altercation started and caused

by his refusal to be handcuffed, that would not mean that the defendant was innocent of the charge of possessing a substantial quantity of cocaine with intent to distribute. Be careful that the essence of your function is not diverted from one case to another. You are not here to try the assault case. You are here to determine whether or not Luis Cashmere is guilty or not guilty of the charge contained in the indictment which I read to you. That is your sole and essential purpose.

You can consider the facts surrounding his arrest to the extent that they help you determine just what the surrounding facts and circumstances were and how it happened and whether or not there was any room for the argument made by defense counsel that this bag of cocaine was either planted or put under the car because that, as I understand it, is what he is suggesting to you. The issue as to whether the defendant was struck and whether he is guilty of this offense are entirely separable and distinct issues. Remember, the circumstances surrounding the arrest and whether or not Cashmere was struck bear upon the credibility of the agents and will help you to determine the precise sequence of events leading to his arrest and removal from the scene of the arrest, but you should be careful not to jump from any conclusion in one instance

to the other.

Drug enforcement -- I was about to say unfortunately, I am not sure I can say unfortunately. Drug enforcement does involve the use of guile, the use of stratagem. Most people don't like guile or stratagem because there is something hypocritical and false about saying you are somebody else, about making people believe something that just isn't true, but ladies and gentlemen, if drug enforcement were carried on under a neon sign and if drug enforcement agents were forced to carry T shirts in large letters saying "I am a drug enforcement agent," you can be sure that there would be very few persons ever arrested for violating the law. Unfortunately if a crime of this nature is committed it is a crime that is committed covertly in an atmosphere of secrecy and with circumstances which have just about compelled the use of guile and stratagem and I would say almost unfortunately again, the use of persons who act as informants or as informers.

Many people don't like informers either. Many persons have a feeling that an informer is a tattletale, an informer is somebody who tells on somebody else and he is no good because he snitches, as they say. Ladies and gentlemen, the services of an informant are available to government agents at times to obtain information about

1 when to make introductions to persons suspected of violating
2 the law. It is a law enforcement device which is entirely
3 proper, just like the use of guile and strategy, and if
4 they were not used the lack of their use would seriously
5 impair the validity and effectiveness of drug enforcement.
6 There are certain types of crime, and this is one of them,
7 where the use of informants is necessary because de-
8 tection of the commission of a crime would be extremely
9 difficult without them. Frequently it is necessary to get
10 leads about persons allegedly engaged in illegal activities
11 or otherwise to aid enforcement officers.

12
13 From time immemorial the law has allowed the
14 use of informers provided the rights of defendants are
15 not violated.

16 Whether or not you approve of the use of an
17 informant in an effort to detect law violation is not to
18 enter into your deliberations. You have no right to say
19 I don't like informants. If there is an informant in
20 the background of this case, I don't like it, therefore
21 I will come to this, that or the other conclusion. You
22 have no right to do that, ladies and gentlemen, if the
23 evidence before you is legal and proper and we have to
24 weigh it.

25 Now, the defendant did not take the stand to testify

1zh

in his own behalf. I instructed you that you are to draw no adverse inferences from this. Our Constitution guarantees to the defendant the right to remain silent throughout the trial and you are not to let his exercise of this right influence you in your determination of his guilt or innocence. You should not speculate as to the reasons for the defendant's failure to take the stand. Nor should you permit this matter to enter into your appraisal of the evidence in any way.

You should not be concerned with any question of penalty or punishment if the defendant is convicted. That burden rests squarely upon my shoulders. You should not discuss it. You should not permit any possible penalty or sanction to influence your verdict in any way or in any sense to enter into your deliberations. Your function is to weigh the evidence in the case and determine the guilt or innocence of the defendant solely upon the basis of such evidence and the law.

You are not to be influenced by a presumption, conjecture or sympathy or any inference not warranted by the facts unless proven to your satisfaction.

If you fail to find beyond a reasonable doubt that the laws were violated, you should not hesitate for any reason to find a verdict of acquittal. On the other

1
2 hand, if you should find that the law has been violated
3 as charged, you should not hesitate because of sympathy
4 or any other reason to render a verdict of guilty.

5 Ladies and gentlemen, if the law was violated
6 in February, 1976, that is a matter that has already
7 occurred. It is not you who are creating the violation
8 of law. You are being asked to look at this evidence
9 and determine from this evidence whether there was
10 a violation of law because that is all behind us. If
11 there wasn't, there wasn't. It is all behind us. It is
12 all a part of what has happened, has already transpired.
13 The clerk, when you come back will ask you a very significant
14 question, a question that is freighted with significance
15 and which is, "Ladies and gentlemen of the jury, how
16 do you find," and you say "We find the defendant guilty"
17 or "Not guilty." And you must arrive at that conclusion
18 by a unanimous vote. It should be the expression of your
19 unanimous consensus, your agreement with respect to that
20 finding, but that finding is in effect as though you were
21 saying we have looked into the past, we have examined
22 this evidence, we have weighed it and sifted it and we
23 have reconstructed the facts in such a sense that we are
24 now convinced under the law that has been charged to us
25 that this defendant is guilty or is not guilty as the

2 case may be. It is an attempt by you to ascertain the
3 truth after having examined the facts under the law
4 as I have charged you. You should be careful, as I told
5 you at the outset, not to speculate any evidence into
6 the case, and if you reach the point where you are having
7 any difficulty about anything that I have charged,
8 don't hesitate to send me a note and ask me to clarify
9 or explain anything I may have said. One of the worst
10 traps that a jury can fall into is to give itself legal
11 advice. You should not do that. Another trap is to speculate
12 facts into the case.

13 You are a little bit like a pathologist who is
14 being asked, and I know perhaps some of you have been
15 through the distressing experience of waiting for a
16 beloved one who is in surgery and a surgical team is there
17 all scrubbed and gloved and hatted and gowned and waiting
18 for the report of the pathologist, what are they going
19 to do. This precious body that is lying before them
20 under anesthesia, should they do this or should they do
21 that. And it all depends on what that pathologist is going
22 to tell them in a few minutes. He is there with a powerful
23 microscope and slides to obtain some tissue which they
24 have just removed from the patient's body and he is going
25 to give a jury a sound professional judgment. He has

2 no right to get mad at that slide and he has no right
3 to have any emotional approach to it. This is a cool,
4 objective, conscientious judgment as to what he says,
5 and that is precisely what you are being asked to do
6 with respect to this evidence under the law that I am
7 charging you. It must be a claim, unprejudiced, true,
8 conscientious evaluation of the evidence so that then you
9 can come back into the courtroom with an assurance that
10 what you have found is based upon the truth.

11 There is no room in the jury room for a Mr.
12 or Mrs. take charge or wallflower. You should be anxious
13 and willing to explain your point of view. You should be
14 equally anxious and willing to listen to the points of
15 view of your fellow jurors. What the law contemplates
16 by the jury verdict is the consensus, the agreement after
17 discussion. A juror who goes into the jury room and
18 says, don't talk to me, I know what I am going to do, is
19 not performing his duty properly, or a juror who says, I am
20 too shy, please leave me out of this, tell me what you are
21 going to do and I will follow along, that juror isn't
22 performing his duty properly. Each one of you ladies and
23 gentlemen should go in with an anxious desire to

24

25

2 explain your point of view and with a desire equally anxious
3 to listen and consider the point of view of your fellow
4 jurors.

5 The controverted facts in the case are sometimes
6 like a mosaic and I am sure many of you have seen this
7 surface declaration that often exists in oriental
8 architecture particularly and it is made up by the inlaying
9 of the patterns of small pieces of various porcelain,
10 terra cotta, glass or other materials and when you are
11 close to a mosaic it is a jumble of lines and colors.
12 You cannot see or discern the purpose of the artist,
13 but if you draw away from it and consider it as a whole,
14 those colors and those lines come into a relationship
15 with each other and you can then discern the purpose
16 of the artist, and that is very often true with respect
17 to the controverted facts in the case.

18 Try to bring yourself back to the vicinity
19 of East 116th Street and Third Avenue on this February
20 day in 1976, early in this year, and on the basis of the
21 evidence before you, try to reconstruct what occurred.

22 I want to thank the alternate jurors for their
23 attendance. They will be excused as the jury retires in
24 a few minutes. Please remove any articles you may have
25 in the jury room and the clerk will advise you as to

whether you have any further obligations in connection with your jury service. The law requires that the jury that considers the verdict shall be the first 12 jurors chosen and it is they who will give the verdict.

The verdict should be guilty or not guilty. There is only one count and so your verdict will be only guilty or not guilty and I repeat, it should represent the conscientious, unanimous determination of each and every one of you.

I think I have said all I need to say, ladies and gentlemen. I apologize for being slightly disorganized. I haven't exceeded my time too much. You will have a recess right away. I just need to talk to the attorneys to see whether or not they have any exceptions and then I can excuse you.

(At the side bar)

MR. GOULD: The defendant objects to the entire charge, most specifically he objects to the Court's charge that the -- if they believe there was a frame. He objects to the Court's discussion of when Moran allegedly got in the car, he thinks it was incorrect. Moran testified he was in the car sitting there while Cashmere was supposedly going to throw this brown bag out. Not that he got in after that happened. He suggests that to have the jury say well,

2 they planted it, they didn't plant it, that decision is
3 incorrect. I am saying that the entire charge does
4 not leave room for the jury to say they didn't prove their
5 case as opposed to accepting whether the officers framed
6 somebody or didn't frame anybody.

7 THE COURT: I fail to understand what the nature
8 of your contention is. All I gathered from it is that you
9 don't like the charge and that I may have misled them
10 with respect to certain evidence, is that right?

11 MR. GOULD: The charge is highly prejudicial.

12 THE COURT: Mr. Reilly, I need your help as a
13 friend of the court if you think that I misled them.

14 MR. REILLY: Your Honor, the government doesn't
15 think you misled. However, I do believe Mr. Gould
16 stated in his summation at one point that they didn't
17 have to find that it was a frame-up but that they were
18 misled themselves by somebody who placed the drugs under
19 the car.

20 THE COURT: I didn't say they had to find it was
21 a frame. I said if they find it was a frame and I also
22 suggested that the charge was made either that the agents
23 framed or that the drug was placed under the car by someone
24 else. Didn't I say that?

25 MR. REILLY: You did say it but I think there was

1 a point where you suggested that the defense's frontal
2 attack was that these agents framed the defendant.
3

4 THE COURT: In addition to that attack which they
5 did make they also suggested the agents may have been
6 mistaken, right?

7 MR. REILLY: Yes.

8 THE COURT: And they also suggested the narcotics
9 might have been put under the car by somebody else, is
10 that right?

11 MR. GOULD: That's correct.

12 THE COURT: All right.

13 (In open court)

14 THE COURT: Ladies and gentlemen of the jury,
15 I will be very brief. I merely want to add two things.
16 First, remember that all of the evidence is before you
17 for you to weigh and that nothing that I have said is
18 intended to take the fact finding function away from you
19 in any way.

20 Secondly, if I indicated to you that there
21 was a charge of framing in this case, I do not wish to
22 leave you with the impression that the defense rests
23 entirely upon the possibility of being framed and it is
24 either a frame or it isn't a frame. There is a lot more
25 to the defendant's arguments than just that. The defendant

1 lzh
2 says it may have been a frame. It is not necessarily a
3 frame. The agents may have been mistaken, and thirdly,
4 they may have been imposed upon by a third party who
5 put the narcotics under the car, so the defense is a good
6 deal broader than what I may have indicated to you. I
7 don't want to leave you with the impression that the defense
8 has to prove a frame. The defense, in the first place,
9 has to prove nothing. Whatever evidence the defense has
10 offered, of course, is for you to weigh and consider but
11 the burden is on the government and rests with the government
12 to prove the defendant guilty beyond a reasonable doubt,
13 but in trying to state the defendant's position I want
14 to make it clear and Mr. Gould has just made it clear to
15 me now that it has three aspects to it.

16 An attack upon the accuracy of what the agents
17 did that may rest upon their being mistaken. Secondly,
18 the possibility of being imposed upon by a third person
19 who may have put these narcotics underneath the car.
20 And lastly, the possibility of their having framed the
21 defendant.

22 I leave these arguments and all of the
23 evidence for you to weigh and to consider. You may swear
24 in the marshal.

25 (A marshal was sworn.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

lzh

237

THE COURT: Are there any further exceptions
or suggestions by counsel?

MR. REILLY: No.

MR. GOULD: No.

THE COURT: You may retire, ladies and gentlemen.
(Whereupon at 3:45 P.M. the jury retired
to commence their deliberations.)

CERTIFICATE OF SERVICE

June 6, 1977

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Flg. S. L. B.